

*Assottica, member of Confindustria (Italian Federation of Industries) is representing Optical and Precision Mechanical Industries in Italy. Several companies, members of Assottica, are component suppliers to the Automotive Industry.*

**Re: Assottica position on the application and on the future of Regulation “BER n. 1400/2002”:**

- **Comments on the “EU Commission Evaluation Report” on the operation of the Regulation (drawn up by 31 May 2008);**
- **Proposal to eliminate existing competitive restrictions in the Aftermarket;**

## **I General Remarks**

Before presenting our views and suggestions concerning the Automotive Aftermarket area, which is of great interest for the component industry, we should submit to the attention of the E.U. Commission some comments on the “Commission Evaluation Report” on Reg. 1400/2002 (hereinafter referred to as “the BER”).

First of all we would like to express our appreciation for the wide and deep examination by the Commission of the problems connected with the distribution and servicing of motor vehicles.

Let us start recalling point 5 of the “Commission’s Explanatory Brochure” of the BER published in 2002 (see pag. 40) drawn up by DG Competition.

### **“ 5. RIGHTS. OBLIGATIONS AND OPPORTUNITIES CONFERRED BY THE REGULATION**

#### **5.1. Consumers: increasing consumer choice in accordance with Single Market principles.**

The need to increase the benefits that distribution systems bring to the consumer is at the heart of Commission policy for the motor vehicle sector. By injecting greater competition into vehicle sales, servicing and repair, and the sale of spare parts, Regulation 1400/2002 promotes consumer choice”.

Although great improvements have been achieved in that field, we have to point out that restraints of competition are still applied in some cases.



In the “Evaluation Report” the Commission, after having stressed that the BER has promoted competition to the benefit of Consumers, especially in the markets for after-sales services, seems to consider unnecessary to envisage a replacement of the sectors-specific Regulation referring instead to Reg. 2790/1999 concerning all other categories of vertical agreements and concerted practices except the category of motor vehicles.

The reasons for such attitude can be charged with some constraining effects that the BER might have produced in the regimes of vehicle distribution.

Another reason that would seem to make unnecessary the replacement of the BER is the promoted inter-brand competition as a consequence of the markets developments and the increase of authorized repairers and the overall network density in the after-market, although, as the Commission writes, such achievements are “in large part due to the BER” (Report pag.3).

However, in our opinion, if on one side it is possible to eliminate unnecessary restrictions in the new text of the upcoming BER, on the other side we cannot forget that in certain sectors, competition has to be improved by stricter rules, as we will show, herewith.

Furthermore, we cannot forget that certain competition improvements which seem not due to the BER but to the market developments, are in fact due to the deterrent effect of the BER.

Moreover, should we refer to Reg. 2790/1999, even with appropriate modifications, we could encounter unclear situations, due to the specific problems of the automotive distribution and service sector.

We refer, for example, to art. 3. “general conditions”, art. 4. “hardcore restrictions”, art. 5. “specific conditions” of the BER and, of course, also to art. 1. “definitions”, not to say about the 38 points of “whereas” at the opening of the Regulation.

As Reg. 2790/1999 is often lacking such specific automotive sector clauses and in other cases is not precise enough, we should expect that the text of the BER would be almost completely reproduced in the new text of Reg. 2790/1999. For example: what about “whereas” n. 13 of the BER? And what about art. 5. which contains a list of seven specific obligations which may not benefit from exemption under the Regulation?

Our opinion is different from that of the Commission even if there is no “robust casual link”, as the Commission writes. Art. 5 has certainly also a deterrent function, which often cannot be seen on the field in daily operation.

Concerning hardcore restrictions, let us compare art. 4(1) (j) of the BER with Art. 4 (e) of Reg. 2790/1999.

We see, first of all, that art. 4 (e) does not cover repair tools as well as diagnostic or other equipment. Moreover “authorized” distributors or repairers are not protected by art. 4 (e).

Furthermore, considering that the specific conditions set out in the BER are more numerous and stricter than the corresponding (not always) provisions in



Reg. 2790/1999, the disappearance of legal rules and conditions in formal aspect could create incertitude vis-à-vis practical competition rules and conducts that have developed during many years; not only that, but also judicial and administrative authorities in the UE national members could take opposite interpretation notwithstanding European Court decisions on specific cases, which can leave open certain questions. In other words the BER provides greater clarity to all players in the automotive industry. The Reg. 2790/1999 would certainly not protect competition in the automotive aftermarket to the same degree that the BER is doing.

To raise a claim in the absence of clearly defined hardcore restrictions, as are today in the BER, is a costly engagement, from which small and medium-sized enterprises, are likely to stay away.

We don't think thus that it is an advisable solution not to renew the automotive sector BER.

In fact in the "Explanatory Brochure" the Commission wrote "Reg. 1400/2002 is stricter than its predecessor, Reg. 1475/95, and than Reg. 2790/1999, with a view to remedying the competition problems identified in this sector". Such "competition problems" are ready to be renewed if the deterrent effect of the BER disappears. Another example: Art. 4.(2) (access to information by independent operators) has been often disregarded and should be furthermore highlighted.

On the whole, the European Commission has wide investigative powers which should be used to inspect single cases which impede competition, issuing decisions based, however, on stricter rules than those of Reg. 2790/1999.

Concluding our general remarks we believe it is advisable to maintain a sector-specific Regulation mainly due to, summarizing:

a) the importance of the automotive sector (especially aftermarket service). Given the size of consumer expenditure on repair and maintenance (the highest expenditure comparing with other sectors of appliances: 40% of the total cost of a car life-long goes to repair and maintenance; 40% went to buy the car while 20% for taxes, registration insurance, etc.).

b) The great number of competition problems specific to the automotive sector. The stricter rules needed in the Regulation affecting the automotive sector.

## **II Remarks on Aftermarket**

Approaching the problems of spare parts distribution, and of repair and maintenance services, we recall the positive clarification and effects that the BER has generated. We cannot go in details. Just to remember the useful definitions of Art. 1 (1) (t): "original parts", which has opened in due cases to



component manufacturers the claim of supplier of “original parts”, before considered exclusive right of motor vehicle manufacturers. It would clarify the competitive situation to cancel the “third category” of “original spare parts” and to refer to an “independent Authority” in order to certificate the quality of “matching quality spare parts”.

Turning to the “Evaluation Report” adopted by the European Commission, it is stated that “independent repairers have lost market share” in favour of authorized repairers “while authorized repairers still purchase most of their requirements from the vehicle manufacturers” (Report, pag.4). It is a well-known situation on the market: IAM is losing slowly but continuously market share in favour of authorized networks.

Also spare parts manufacturers and independent distributors of quality spare parts are damaged. The European Commission should deepen investigation on the market to detect cases in which bonus schemes and similar incentives offered by vehicle manufacturers discourage authorized repairers from sourcing spare parts from third parties.

In the “Overall Assessment” chapter of the same “Evaluation Report” adopted by the European Commission, it is recognized that the improvement of competition is mainly due to external economic factors, as inter-brand competition between vehicle manufacturers, which “has translated into falling real prices against a background of increased market integration at EU level” (Report pag.11). For that specific aspect, i.e. competition between vehicle manufacturers, that position seems to be correct, and the BER has played a lesser part although quite important in many aspects (competitive distribution, multi-branding etc.). However we cannot fully agree when, concerning the aftermarket, it is said, by the Commission, that the BER has played a minor role in respect to case-law of the European Court currently reflected in Commission Regulation 2790/1999”. We cannot forget, among other effects, as we said before, the deterrent action of the BER and the strict and precise rules of it.

Later on, considering the problems of tooling and “dual-branding” we will show how it is necessary to promote competition in the aftermarket, not only by maintaining the strict and severe rules of the BER, but also improving them with a further legal step to limit vehicles manufacturers’ pressures to, among others, restrain tooling use, avoid dual-branding, limit the independent repair and service market.

In its “Evaluation Report” the Commission is writing:

“In particular, as regards competition in the market for automotive spare parts, it should be recalled that the intellectual property rights held by vehicle manufacturers and the widespread use of a variety of sub-contracting arrangements with original equipment suppliers (including so-called “tooling arrangements”) have meant that certain spare parts remain captive to the



vehicle manufacturers' networks. This may have somewhat weakened the position of independent parts wholesalers and translated into higher overall repair prices. However, these potential competition issues depend on the application of Article 81(1) to this type of arrangements in each individual case and do not relate to any possible failure of the BER to properly address such problems under Article 81(3)". (Report pag. 12)

We certainly share the Commission's view on the detrimental effect of IPR and tooling agreements, however we think that rather than having recourse to art. 81 (I) for each individual case (too expensive and complex) it would be more practical to provide stricter rules in the BER, as we shall propose here below for IPR and "dual-branding". Not only our evaluation of the loosing market-share of the IAM, but also the results on this area collected and reported in its "Evaluation Report" by the Commission, should turn down without any doubts the conclusion expressed by the Commission as follows:

"In summary therefore, it appears that the provisions of the BER which diverged from the general principles derived from the case-law of the European courts and currently reflected in Commission Regulation 2790/1999 may be regarded, in the current economic context characterized by increasingly globalised and competitive automotive markets, as overly strict, too complex and/or redundant, particularly in view of the introduction of new EU legislation for motor vehicles." (Report pag.12). On the contrary, the reported situations ask for stricter rules.

If we can understand, and also share on several aspects, the Commission's position as far as motor vehicles distribution is concerned, we cannot agree as far as components/parts and independent aftermarket are concerned.

Going to two specific areas where we need an improvement of the BER rules we shall examine first "intellectual property rights" held by vehicles man. and secondly the "dual-branding" problem. Other subjects of attention should be technical information and design, where a clarifying intervention of the Commission has taken place.

#### 1) I.P.R. Intellectual Property Rights and Tooling.

In order to produce components to be used as original parts by vehicle-manufacturers, suppliers use different kind of tools and related IPR.

In many cases tools, IPR and know-how are owned by the component manufacturer. However, in certain cases tools (and IPR) are provided by the vehicle-manufacturer or are paid, fully or partly, by the same. We have also seen vehicle-manufacturers subordinating the execution of a supply contract to the previous transfer of property of tools and/or IPR from the supplier to the same vehicle-manufacturer.

Thus, when the tools and IPR are put at the disposal of the component supplier, in order to produce parts for OEM (first assembly of the car) and OES (service network of the vehicle-manufacturer), the vehicle-manufacturer can



forbid the suppliers to use such tools and relating IPR to produce parts to be sold to independent aftermarket service: i.e. IAM., calling upon, incorrectly we think, their own property rights.

In other cases the supplier is requested to pay a royalty for using tools for IAM parts.

Very often the royalty for using the tools for IAM parts is not negotiated reasonably and is in effect unilaterally imposed: take it or leave its scenario, the costs for which are disproportionately excessive. In fact, it is queried whether this is actually allowed under the BER at all.

Moreover, considering that the price paid by vehicle-man. for OEM/OES parts is often very near to the cost of the supplier, the price that should be paid by independent distributors of repair parts is not at all comparable with the price paid by OEM/OES.

In such a way, competition between the vehicle man. network and the independent dealers is heavily distorted and often impeded.

The situation is even worse when the tools have the trade-mark of the vehicle-man. (see further below).

This linking of tools-rights and trade-mark, with the prohibition for the components-supplier to sell to IAM parts with the trade-mark of the vehicle-manufacturer is eliminating practically every possibility of competition. In fact the supplier in the most favourable case should reproduce the tools, without trade-mark, at the high expenses for a limited supply of repair parts!!

As we have seen, the primary interest of the BER in aftermarket supply is to secure correct competition also relating to IAM.

Thus in the interest of the market, mainly consumers but also distributors and component suppliers, it is necessary to limit certain IPR (the doctrine of limitation of certain rights in the superior interest of the social community is widely known), especially when daily practice demonstrate that they may be used to distort competition to the advantage of one party (see case Grundig – Consten and other judgements of the European Court).

Thus the law should establish that the right of the supplier to supply also the IAM is automatically included in the basic contract between the two parties and could not be the object of a further negotiation. Thus the possible costs for using toolings and IPR should be included in the global costs and price of the basic agreement.

The legal foundation on competition principles is clear; every OEM and OES supply should be consequently linked to IAM supply, without any kind of break that past experience has demonstrated unfair both to customers and to suppliers, but also to independent distribution and servicing.



## 2) Brands

Today the situation on the market is not at all satisfactory. More and more vehicle-manufacturers are imposing, with various arguments and pressures, their own exclusive brand on the components manufactured by the supplier.

Their abuse of trade-mark is evident. Given the vehicle-manufacturer's demand that the trade-mark stamp must be permanently fixed to the tooling, it forces the supplier to invest in new tooling at heavy costs, when the supplier wishes to produce and sell the same product, but without the vehicle-manufacturer's trade-mark.

The provisions of the BER, Art. 4.(1) (I), which are recalled here, seems to make fun to the detriment of suppliers!!

The BER condemns (Art. 4.(1) (I)):

“the restriction agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components which limits the latter's ability to place its trade mark or logo effectively and in an easily visible manner of the components supplied or on spare parts”.

But the easy justification is: “ It has been the free choice of the supplier to renounce to the branding”!!

What is then the solution we think should be adopted, if we want to pursue what declared in the “Explanatory Brochure” of the BER? We propose the following one:

Every component and every part should bring the brand of the supplier, by compulsory way, when one of the parts of the contract is a vehicle-manufacturer.

It is fully correct to require the indication of the producer to the advantage of the customers and of other stakeholders. If the vehicle manufacturer is adding its brand, provided that this is mutually agreed, then both the vehicle manufacturer and the supplier should have the right to supply such parts for the aftermarket, with the same (single or dual) branding.

There are no valid objections to be raised by vehicle-manufacturers. Only the scope to avoid clear competition could be at the base of their objections. After all, if a vehicle-manufacturer trusts on the technology and ability of the supplier to provide parts for the first assembly, thus recognizing the validity of his brand, than he must not refuse that both brands appear together in the component, to avoid confusion on the market (today we have quite often identical products with different branding: parts distributed by the vehicle-manufacturers do have their own trade-mark, sometimes coupled with the one of the supplier while parts distributed by the component-suppliers have only this last trade-mark, and often vehicle-manufacturer declare that the one with their own branding is of better quality!! The confusion on the market is obvious).



### **III Final Remarks**

In the light of the considerations we have presented in our report we would kindly suggest to the EU Commission to renew the BER adopting stricter and more clearly phrased rules.

It is our conviction that if we want to solve the identified problems of distorting competition on the aftermarket (IPR, Tools, Brand) the only successful ways are the ones above indicated.

Moreover, the legislative solution proposed to be included in the new BER should concern only the car distribution market and the related aftermarket. Rules concerning IPR, branding, tools and design should not be applicable to components or parts not supplied directly to vehicle-manufacturer, and to the chain of distributors, repairers including final customers. Such rules would not apply to producers supplying parts to components manufacturers, as they are not involved in the distribution and servicing of motor vehicles (Reg. 1400/2002). In fact, it is in the supplying agreements between vehicle and component manufacturers that we have seen quite often vehicle-manufacturers to take advantage of their IPR, tooling and trade-mark just to restrain correct competition.

For example, the compulsory dual branding (of the vehicle-manufacturer and the component manufacturer) should only be legally binding in the frame of the BER, that is to say only when we have a brand of a vehicle-manufacturer in the OEM supply and afterwards in the aftermarket.

It is well-known that certain obligations of law are made compulsory only for certain economic fields. For ex. in certain countries branding of products is compulsory for pharmaceuticals and not for other sectors. The BER itself is giving an example: it establishes obligations, which apply to vehicles distribution and not to components/repair parts distribution (Art. 5,2).

Finally, equal treatment and unrestricted access to technical and diagnostic information related to IPR should be warranted for all servicing operators, in the area of aftermarket. In this area of “Information” is still necessary to have the stricter rules of the BER. Four vehicle-manufacturer have recently received from the Commission an invitation to respect the legal provisions of the BER, a clear indication that in this case the BER is often disregarded.

Also the problem of design of visible spare parts should be kept in mind, after the intervention of the European Commission. It should be observed in this context that the Commission rightly proposed the introduction of a “repair clause” in its proposal for the revised Design Directive.



In conclusion, according to our views, based on operating experiences on the field, the above suggestions should be adopted by the Commission in the, hopefully, newly upcoming Motor Vehicle BER, starting in 2010, in order to improve competition on the market to the advantage mainly of Consumers, but also of all other stakeholders.

To cancel the rules of BER 1400/2002 which have been so decisive in providing legal certainty and a clear frame for fair competition in the automotive sector, would certainly be detrimental for all stakeholders, especially for Consumers.

**For further information please contact:**

Mrs. Daniela Manenti  
Secretary General  
Assottica-Assomep  
Viale Luigi Pasteur 10  
00144 Roma (Italy)

Phone: 0039 6 54210431  
Fax: 0039 6 54210613  
[d.manenti@assottica.it](mailto:d.manenti@assottica.it)

